Supreme Court of the United States

OCTOBER TERM, 1941.

No. 280.

ROSCO JONES,

Petitioner,

against

CITY OF OPELIKA,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

AMERICAN CIVIL LIBERTIES UNION
As Amicus Curiae.

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BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

The American Civil Liberties Union is interested in this case because it believes that it presents to this Court certain important constitutional problems with regard to the extent to which restrictions may be imposed upon the dissemination of ideas.

The basic question is whether a municipality, under the guise of collecting license fees for the carrying on of various occupations, may require the taking out of such a license and the payment of a fee by any person who, even on a single occasion, offers for sale a pamphlet containing an expression of opinion.

This Court has already held, in a group of cases known as *Schneider* v. *Irvington*, 308 U. S. 147, that restrictions may not be imposed upon the free distribution of expressions of opinion on the public streets. The question then

to be decided here is whether such restrictions can be imposed because a price is demanded.

We do not believe that the broad considerations of policy which led this Court so to decide were affected by the circumstance that in those cases distribution was free.[1] The basic consideration which guided this Court was the importance of the distribution of "information and opinion." That pamphlets of various kinds have in the past played an important part in our history is well established and has been recognized by this Court.[2] Surely this Court did not mean to confine its observations to pamphlets distributed free. For, as was pointed out in *Commonwealth* v. *Reid*, 20 A. 2nd (Pa.) 841, the famous pamphlets of our history were not circulated without charge, but were either distributed to subscribers or were sold on the streets. Paine's *Commonsense*, for instance, was originally published to be sold at 2 s.; and his *American Crisis* was also not given away, for it produced profits which he dedicated to the service of the American Revolution (see Introduction to Paine's Political Writings, London, 1909, pp. 3, 5).

That pamphlets continue to be of importance in the instruction of the public and the formulation of public policy can hardly be doubted. Indeed, under modern conditions pamphlets are even more essential for such purposes, since it has become increasingly difficult, by reason of technical requirements and expense, to establish newspapers.

No valid reason exists for making any distinction between free distribution, distribution accompanied by solicitation for contributions, as in the *Schneider* case, or distribution, as here, accompanied by a fixed price demanded for each pamphlet distributed. To make such distinction

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[1] It may be noted that in the *Schneider* case itself a voluntary contribution was requested by the distributor; this apparently was not considered significant.

[2] *Grosjean* v. *American Press Company*, 297 U. S. 233, 245; *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Thornhill* v. *Alabama*, 310 U. S. 88, 97.

would militate against groups desirous of spreading their views who lack financial means; it would facilitate propaganda by the rich and powerful, who are more readily able to use existing means of communication, such as the newspapers and the radio; it would discriminate against those groups in the community least able to make their voices heard through these more conventional media. Surely this Court will not sanction such discrimination.

That distribution of pamphlets should be unrestricted, even though a price be exacted for them, has been widely recognized. In many cases the courts have held laws unconstitutional in so far as an attempt was made to include within their scope the sale of printed matter which consisted of expressions of opinion:

Zimmerman v. *Village of London*,[3] 38 F. Supp. 582;
Reid v. *Borough of Brookville*, 39 F. Supp. 30;
Donley v. *City of Colorado Springs*, 40 F. Supp. 15;
State ex rel. Hough v. *Woodruff*[3], 2 So. 2nd (Fla.) 577;
Thomas v. *City of Atlanta*,[3] 59 Ga. App. 520;
Village of South Holland v. *Stein*, 373 Ill. 472;
Herder v. *Shahadi*, 125 N. J. L. 153;
People v. *Banks*, 168 N. Y. Misc. 515;
City of Cincinnati v. *Mosier*, 61 Ohio App. 81;
Commonwealth v. *Reid*, 20 A. 2nd (Pa.) 841;
State v. *Meredith*[3], 15 S. E. 2nd (S. Car.) 678;
State v. *Greaves*, 22 A. 2nd (Vt.) 497.

See also *State ex rel. Semansky* v. *Stark*, 196 La. 307, and *People* v. *Finkelstein*, 170 N. Y. Misc. 188, in which

[3]In these cases the Court relied rather on the guaranty of religious freedom than on that of freedom of the press.

ordinances were construed not to cover the sale of religious or political tracts.

We submit that there is no merit to the various considerations to the contrary relied upon in the case at bar by the Supreme Court of Alabama. That Court thought (6, 7) that the decision of this Court in *Cox* v. *New Hampshire*, 312 U. S. 569, was controlling. But in that case this Court was not concerned with the distribution of expressions of opinion, but with the right to use the public streets for the purpose of parade, an entirely different matter. It is one thing to say that a municipality may have the right to require permits for the holding of parades; for these always inconvenience large portions of the public, and it is important that there be no conflict between two parades scheduled for the same time and place. It is quite another thing to say that a municipality may have the right to restrict the distribution of pamphlets constituting expressions of opinion on the public streets merely because a price is asked for the same.

For it cannot be doubted that the enforcement of ordinances of the type here under review would seriously restrict the dissemination of opinion. It is not altogether clear under which occupation listed in the ordinance petitioner was supposed to come, whether he was considered a book agent (required to pay $10 a year [26]) or a transient agent (required to pay only $5 a year [38]). It can readily be seen that were any large number of communities to impose license fees of this character the work carried on by petitioner and his associates would become impossible. They would either have to abandon any attempt to collect money in connection with the distribution of their literature or pay thousands of dollars a year in license fees. Moreover, it would be possible for communities which disliked their activities to prevent them altogether, either by delaying granting licenses, there being nothing in this ordinance requiring the immediate issuance

of a license, or by revoking licenses without notice, which the City Commission is expressly given the right to do (22).

In this respect the ordinance before this Court is quite different from the ordinance in *City of Manchester* v. *Leiby*, 117 F. 2nd 661, certiorari denied 313 U. S. 562, a case relied upon by the Alabama Supreme Court (7). In that case no license was required, but merely that each vendor obtain an identification badge, for which a deposit of 50¢ was to be paid, returnable upon the surrender of the badge. Moreover, the ordinance made it mandatory that a badge be issued immediately upon receipt of an application. The language of the Circuit Court of Appeals approving the ordinance must be read in the light of these particular facts. Moreover, the discussion with regard to the validity of the ordinance was not necessary to the decision, since it might well have rested upon the fact that there an action was brought to restrain the enforcement of the ordinance. This is made clear from the decision of the same Court in *Hannan* v. *City of Haverhill*, 120 F. 2nd 87, certiorari denied 314 U. S. ——. There the Court ruled that it was not necessary to decide a doubtful question with regard to the constitutionality of the ordinance in an action to enjoin the same, citing the *Leiby* case. It held that the proper way that such question should be raised was by an appeal from a conviction in the State Court, particularly since the constitutional question might never arise because of the manner in which the ordinance might be construed by the highest court of the state.

Nor is *Ex parte Stein*, relied upon by the Alabama Court (9) pertinent here, for in that case no question of distribution of expression of opinion was involved. None of the cases cited by the Alabama Supreme Court, therefore, throw light on the problem now before this Court.

It is important to observe that no regulation of the use of the streets is really involved in this case. There is no

evidence to support any inference that petitioner sought to establish himself upon the public streets in any particular place for the purpose of carrying on a business there. In that respect this case differs entirely from *Commonwealth* v. *Pascone*, 1941 Mass. Adv. Sheets 713, certiorari denied 314 U. S. ——. There the Massachusetts Court expressly held that the ordinance was not aimed at persons "simply going about from place to place." That ruling constituted such a construction of the ordinance as to make it clear that what was attempted was the regulation of a business, not a restriction upon the dissemination of opinion. However, in the case at bar the Supreme Court of Alabama did not limit its approval of the ordinance in any similar manner. Nor was there any evidence which would have supported a conviction under an ordinance so restricted.

That an ordinance of the type involved in the case at bar is not regulatory in any true sense was recognized by the Supreme Court of Vermont in *State* v. *Greaves*, supra. That Court held that the imposition of a license fee was a restraint upon circulation within the *Grosjean* case, supra, as well as within the *Lovell* and other cases already cited herein.

Moreover, the ordinance has a provision which permits revocation of a license in the unregulated discretion of the State Commission (22) and is, accordingly, substantially identical with the ordinance condemned by this Court in the *Lovell* case. For it can make very little difference in practical effect whether the discretion is exercised before the granting of the license or immediately afterward. This was recognized in the Court of Appeals of the State of Alabama, which reversed the conviction primarily on that ground (64).

Respondent has argued that the ordinance can be sustained as a tax under the statements of this Court in the *Grosjean* case, supra, and in *Associated Press* v. *National*

Labor Relations Board, 301 U. S. 103, 133. Respondent in this connection relies also on *Giragi* v. *Moore*, 48 Ariz. 33, 49 Ariz. 74, appeal dismissed 301 U. S. 670, and on *Arizona Publishing Company* v. *O'Neil*, 22 F. Supp. 117, affirmed per curiam 304 U. S. 543. There can, of course, be no doubt that persons engaged in commercial enterprises, which involve the distribution of organs of opinion, cannot claim exemption from taxes generally imposed. And the Arizona statute involved in the two cases relied upon by respondent comes within that general category. For there the State imposed a general sales tax on the gross proceeds of business carried on in the state. The tax was not directed at the distribution of opinion.

But the ordinance now before the Court is of an entirely different character. If it be construed as a tax at all, it is an occupation tax, and, as applied to this petition, a tax on the sole occupation of distributing on the public streets leaflets constituting expressions of opinion. It cannot be doubted that had the municipality sought to enforce this ordinance against a person who was freely distributing leaflets of that character, this attempt would have been void. For this Court has held the right to distribute such leaflets to be protected by the Fourteenth Amendment. Any attempt to tax the exercise of such right would, therefore, be a tax on a privilege guaranteed by the United States Constitution and invalid. See *Colgate* v. *Harvey*, 296 U. S. 404[4]; *Crandall* v. *Nevada*, 6 Wall. 35.

We have already pointed out that the circumstance that a price was asked for the leaflet distributed in the case at bar can make no difference in the application of the fundamental constitutional principle. We are not dealing here with a commercial enterprise such as was involved in the two Arizona cases, but with a person whose sole occupation it is to spread the truth as he sees it, sometimes asking for a contribution, at other times, as in the

[4]The overruling of that case in *Madden* v. *Kentucky*, 309 U. S. 83, does not affect the principle here contended for.

case at bar, asking for a flat price for each leaflet distributed. We do not believe that the statements which this Court has made with regard to the liability of newspapers to pay ordinary taxes were intended to permit the taxation of persons situated as is this petitioner.

We submit, therefore, that the conviction should be reversed and the ordinance held invalid. We believe that this Court should make it clear that the constitutional protection extends to all forms of distribution of opinion and information, that the same cannot be prohibited or taxed, that the circumstance that money is asked, whether directly or otherwise, is entirely immaterial. That will still leave to the states and their municipalities full power to regulate the use of the streets so as to prevent the usurpation of the same, either by a particular individual seeking to establish himself in business at a particular place, as in the *Pascone* case, or by a group of individuals seeking, by the device of a parade, to occupy the whole street, as in the *Cox* case. Whether a municipality can go further and require distributors on the streets to obtain some badge of identification upon the making of a nominal deposit for the same, as in the *Leiby* case, need not be decided at this time. Clear it is, however, that to permit municipalities to exact license fees for the distribution or sale of pamphlets on the public streets would effectively restrict and in many cases make impossible such distribution. And it can make no difference that in a particular case the amount charged may be relatively small. Nor can the ordinance in the case at bar be viewed an isolated one, as the increasing number of similar cases indicates.

The effect of upholding an ordinance of this kind on the distribution of literature is bound to be catastrophic. No considerations of state public policy require such result. For, as already noted, this ordinance is not really regulatory at all. This is, therefore, one of those situations in which this Court should be "astute" to examine the effect of the legislation attacked (see *Schneider* v.

Irvington, supra). So viewed, the ordinance must, as applied to this petitioner, be held unconstitutional.

Respectfully submitted,

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